95-1661

Supreme Court, U.S.
FILED
FEB 21 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

DOMINIC ROBERT, et al., Petitioners

v.

PHILADELPHIA PARK, et al., Respondents

On Petition for Writ of Certiorari to

The Supreme Court of Pennsylvania

Petition for Writ of Certiorari

Lawrence A. Kalikow

Counsel of Record

515 Stump Road, Suite 210

North Wales, PA 19454

(215) 393-0700

Richard J. Abramson

86 Buck Road

Holland, PA 18966

25pp

QUESTIONS PRESENTED FOR REVIEW

Whether the gag order issued by the trial court during civil discovery proceedings, which order was not based upon any showing of good cause, was not limited to the context of pretrial discovery and did not allow for the dissemination of the same information if gained from other sources, violates the First Amendment of the United States Constitution.

LIST OF THE PARTIES

DOMINIC ROBERT, A MINOR BY HIS MOTHER AND NATURAL GUARDIAN, MARY ANNE ROBERT

MARY ANNE ROBERT

PHILADELPHIA PARK

BENSALEM RACING ASSOCIATION, INC.

KEYSTONE TURF CLUB, INC.

GREENWOOD RACING, INC.

THOROUGHBRED RACING PROTECTIVE BUREAU, INC.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1

LIST OF THE PARTIES 2

TABLE OF CONTENTS . . . . . 2(a)

TABLE OF CITED AUTHORITIES 3

OPINIONS AND ORDERS BELOW 4

STATEMENT OF JURISDICTION 5

CONSTITUTIONAL PROVISIONS 6

STATEMENT OF THE CASE 8

ARGUMENT 13

APPENDIX:

PA SUPREME COURT ORDER A-1

PA SUPREME COURT ORDER B-1

PA SUPERIOR COURT ORDER C-1

COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA ORDER D-1

TABLE OF CITED AUTHORITIES

CASES:

Seattle Times v. Rhinehart, 467 U.S. 20, 104, S.Ct. 2199, 81 L.Ed.2d 17(1984) 12-16

CONSTITUTIONAL PROVISIONS:

U.S. Constitution Amendment 1 13, 14, 17

OPINIONS AND ORDERS BELOW

No opinions were delivered in the courts below. By order dated December 6, 1994, The Supreme Court of Pennsylvania granted Petitioners' Petition for Allowance of Appeal, said order is reported at _____Pa._____, 652 A.2d 839 (1995). By order dated November 22, 1995, the Supreme Court of Pennsylvania dismissed Petitioners' appeal as having been improvidently granted, said order is reported at _____Pa._____, 667 A.2d 211 (1995). Copies of said orders are attached hereto in the appendix. The orders of the Superior Court of Pennsylvania and the Court of Common Pleas of Bucks County, Pennsylvania have not been reported. Copies of said orders are attached hereto in the appendix.

STATEMENT OF JURISDICTION

On November 22, 1995 the Supreme Court of Pennsylvania entered an order dismissing Petitioners' appeal as having been improvidently granted.

This court has jurisdiction to review the order below by writ of certiorari pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The challenged gag order arose out of a civil action commenced on September 8, 1991 alleging, inter alia, that minor Plaintiff and his mother were subjected to an unlawful seizure, holding, imprisonment and detention of their persons without probable cause at the Philadelphia Park Race Track on June 6, 1991.

In the course of pretrial discovery, Plaintiffs sought to compel an answer to their interrogatory seeking disclosure of the name of the alleged confidential informant who provided the information upon which the challenged search and seizure were based. On August 10, 1993, Defendant, Philadelphia Park, was ordered by the Court of Common Pleas of Bucks County, Pennsylvania, per the Honorable Ward F. Clark, to disclose the name of the

alleged confidential informant. Subsequently, Defendants filed a Motion For Protective Order in the trial court. A court proceeding was held in connection therewith on November 19, 1993. After directing defense counsel to disclose, at sidebar, the identity of the alleged confidential informant, the trial court without hearing any evidence, issued a gag order from the bench prohibiting Plaintiffs' counsel from disclosing the identity of the alleged confidential informant to anyone until further Order of Court.

To date, the gag order has neither been modified nor vacated but rather remains in full force and effect as issued.

The gag order entered by the trial court is set forth below:

"Within 90 days of today the deposition of the following named persons will be completed by the Plaintiff. . .

All right, in addition to that Order within 120 days of today that would be 30 days after the 90, the deposition of the C.I. will take place in my chambers in camera.

Meanwhile the identity of the C.I. will not be disclosed by the attorneys in this case -- Plaintiff

> or Defendant, all of you being officers of the Court and this gag order on disclosing such identity will remain in full force and effect until further Order of the Court."

The federal question sought to be reviewed was raised in the trial court by Motion For Reconsideration of the Gag Order filed on November 29, 1993. That Motion was never ruled upon. A Notice of Appeal from the November 19, 1993 gag order was timely filed with the Superior Court of Pennsylvania on December 20, 1993. Subsequent to Defendants' Petition to quash the appeal as interlocutory and Plaintiffs' reply thereto addressing the

federal question, The Pennsylvania Superior Court quashed the appeal on April 12, 1994 without reaching the merits and without written opinion. Plaintiffs filed a Petition For Allowance of Appeal to the Pennsylvania Supreme Court on May 11, 1994, again raising the federal question. After the submission of briefs and oral argument, the Pennsylvania Supreme Court by Order dated November 22, 1995 dismissed the appeal as having been improvidently granted.

ARGUMENT

The Supreme Court of Pennsylvania through its denial of discretionary review of the challenged gag order has allowed an impermissible prior restraint on speech to stand.

It cannot be gainsaid that the challenged gag order constitutes a substantive encroachment on freedom of speech in the nature of prior restraint. As made clear by your Honorable Court in Seattle Times v. Rhinehart, 467 U.S. 20, 104, S.Ct. 2199, 81 L.Ed. 2d 17 (1984), a protective order restricting speech is subject to First Amendment scrutiny. More specifically, Seattle Times set forth the following prerequisites for the issuance of a constitutionally valid gag order in connection with discovery proceedings: 1) that it be based upon a "showing of good

cause"; 2) that it be "limited to the context of pretrial civil discovery"; and 3) that it "not restrict the dissemination of the information if gained from other sources." In light of Seattle Times, it is apparent that in the absence of any of the foregoing prerequisites, the issuance of a gag order will not pass constitutional muster.

Measured against the criteria established in Seattle Times, the gag order challenged instantly must be struck down as violative of the First Amendment. First, there is a glaring absence of evidence of record in the case at bar demonstrating the existence of "good cause" for the gag order entered by the trial court. No testimony was taken and, unlike in Seattle Times, no affidavits were submitted to the trial court

demonstrating any basis for the issuance of a gag order.

With respect to the second prong of Seattle Times, it is clear that the scope of the challenged gag order is "not limited to the context of pretrial civil discovery." Rather, by its express terms, the gag order is to remain in effect indefinitely. The trial judge stated on the record in entering that order: ". . . and this gag order on disclosing [the identity of the C.I.] will remain in full force and effect until further Order of the Court." Finally, the challenged gag order similarly fails to satisfy the third prong of Seattle Times. The language chosen by the trial court in fashioning that order creates a blanket prohibition against disclosing the identity of the alleged confidential informant and clearly

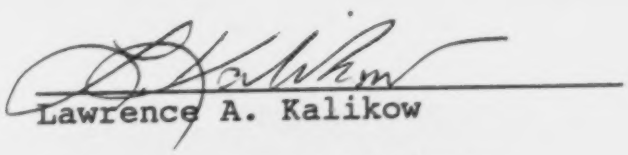
precludes the dissemination of such information even if gained independently of the discovery process. This is in stark contrast to the protective order issued in Seattle Times, the terms of which order expressly limited its application to only information gained by the defendant through the use of the discovery process. Clearly, to the extent the instant gag order restricts dissemination of information gained outside the discovery process, it must be viewed as a classic prior restraint on protected speech, requiring exacting First Amendment Scrutiny. See Seattle Times, supra.

If the challenged gag order cannot survive the relaxed First Amendment scrutiny applicable in the context of pretrial civil discovery, a fortiori it

cannot survive the constitutionally mandated heightened scrutiny applicable to classic prior restraints.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.



Lawrence A. Kalikow
Attorney for Petitioner
515 Stump Road
Suite 210
North Wales, PA 19454
(215) 393-0700

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

DOMINIC ROBERT, a minor by his mother and natural guardian, MARY ANNE ROBERT, and MARY ANNE ROBERT

Petitioners

v.

PHILADELPHIA PARK and BENSALEM RACING ASSOCIATION, INC., and KEYSTONE TURF CLUB, INC., and GREENWOOD RACING, INC., and THROROUGHBRED RACING PROTECTIVE BUREAU, INC.

Respondents

No. 388 E.D. Allocatur Dkt. 1994

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM:

AND NOW this 5th day of December, 1994, the Petition for Allowance of Appeal is GRANTED.

[J-162 of 1995]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

DOMINIC ROBERT, a minor by his mother and natural guardian, MARY ANNE ROBERT, and MARY ANNE ROBERT

v.

PHILADELPHIA PARK, and BENSALEM RACING ASSOCIATION, INC., and KEYSTONE TURF CLUB, INC., and GREENWOOD RACING, INC., and THROROUGHBRED RACING PROTECTIVE BUREAU, INC.

No. 102 E. D. Appeal Dkt. 1994

Appeal from Order of Superior Court entered April 12, 1994, at No. 0004 Philadelphia 1994, Quashing Appeal from Order of Court of Common Pleas of Bucks County, Civil Division, entered November 19, 1993, at No. 92-08480-17-2

Argued: October 23, 1995

ORDER

PER CURIAM: DECIDED: November 22, 1995

Appeal dismissed as having been improvidently granted.

Judgment entered

IN THE SUPERIOR COURT OF PENNSYLVANIA

DOMINIC ROBERT, a minor by his mother and natural guardian, MARY ANNE ROBERT, and MARY ANNE ROBERT

Appellants

v.

PHILADELPHIA PARK and BENSALEM RACING ASSOCIATION, INC., and KEYSTONE TURF CLUB, INC., and GREENWOOD RACING, INC., and THROROUGHBRED RACING PROTECTIVE BUREAU, INC.

No. 00004 Philadelphia 1994

(C.P. Bucks County No. 92-008480-12-2)

ORDER

The court hereby grants the motion to quash this appeal.

PER CURIAM

DATE: April 12, 1994

IN THE COURT OF COMMON PLEAS OF

BUCKS COUNTY, PENNSYLVANIA

CIVIL ACTION -- LAW

DOMINIC ROBERT

v.

PHILADELPHIA PARK

No. 92-8480-17-2

BEFORE: HONORABLE WARD F. CLARK, JUDGE

DOYLESTOWN, PENNSYLVANIA

NOVEMBER 19, 1993

Within 90 days of today the deposition of the following named persons will be completed by the Plaintiff.

. . .

All right, in addition to that Order within 120 days of today that would be 30

days after the 90, the deposition of the C.I. will take place in my chambers in camera.

Meanwhile the identity of the C.I. will not be disclosed by the attorneys in this case -- Plaintiff or Defendant, all of you being officers of the Court and this gag order on disclosing such identity will remain in full force and effect until further Order of the Court.

Lawrence A. Kalikow
Counsel of Record
515 Stump Road
Suite 210
North Wales, PA 19454
(215) 393-0700

Richard J. Abramson
86 Buck Road
Holland, PA 18966